In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 596

HAROLD KONIGSBERG, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 19a–38a) and its opinion denying a petition for rehearing (Pet. App. 41a–43a) are not yet reported. The opinion of the district court denying a motion to suppress (Pet. App. 3a–18a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on August 13, 1964 (Pet. App. 39a–40a). A petition for rehearing was denied on September 18, 1964 (Pet. App. 41a–45a). The petition for a writ of certiorari was filed on October 16, 1964. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

753-185—64

QUESTIONS PRESENTED

1. Whether it was reversible error to admit petitioner's incriminatory statements made after he had been told of his right to counsel but before he was allowed to call counsel.

2. Whether the arrest without a warrant of petitioner and others was valid, so that stolen goods seized as incidental to the arrest were admissible in evidence.

3. Whether the court's charge was proper.

STATEMENT

Petitioner and several co-defendants were convicted in the United States District Court for the District of New Jersey of possessing goods valued in excess of $100, constituting part of an interstate shipment, with knowledge that they were stolen, in violation of 18 U.S.C. 659. He was sentenced to imprisonment for ten years (R. 321a–322a). The conviction was affirmed (Pet. App. 39a–40a).

In the government's brief in opposition to certiorari in the companion case of co-defendant Joseph Celso, No. 492, this Term, pp. 2–6, we have set forth the evidence, developed on the defendants' pre-trial motion to suppress, as to the arrest of the petitioner and a number of his co-defendants in a garage in Bayonne, New Jersey, and the seizure, incidental to the arrest, of a large number of stolen suits. This evidence is also relevant to the instant case. The evidence summarized here pertains solely to petitioner's claim that incriminating statements, made at the

Newark FBI office after his arrest, were improperly admitted against him.

A hearing (at which petitioner did not take the stand) was held outside the presence of the jury to determine the admissibility of those statements. FBI Agent Straub testified that, after petitioner's arrest in the garage a 10:35 p.m., he was placed in an automobile to be driven to the Newark FBI office. Petitioner was told that he was entitled to an attorney, and that anything he said might be used against him in a court of law (Tr. 878–879, 885).[1] During the trip petitioner asked to make a telephone call, but was not permitted to do so (Tr. 879). The agents arrived at the Newark office at 11:22 p.m. (Tr. 884–885). Between 11:30 p.m. and 12:25 a.m. the following morning (January 12, 1962), Straub and petitioner were engaged in counting about $11,000 which petitioner had on his person (Tr. 892–893, 887). Between 12:25 a.m. and 1:06 a.m. Straub continued talking with petitioner (Tr. 893–894). At 1:06 a.m. petitioner was fingerprinted and photographed (Tr. 893). About 1:20 a.m. he was permitted to telephone his counsel. Petitioner had previously made 4 or 5 requests for permission to place such telephone call (Tr. 900, 882, 896–897). The agents testified that the call was postponed in order to give petitioner a chance to explain why he and other persons were in the garage, and to allow the agents time for such administrative tasks as counting petitioner's money, and fingerprinting and photographing him (Tr. 865–866, 886–887; see also Tr. 1124–1125).

[1] "Tr." refers to the trial transcript.

In the presence of the jury, the court, over petitioner's objection (Tr. 905), permitted Agent Straub to testify as follows with regard to a conversation with petitioner prior to the telephone call to his attorney (Tr. 908):

> Well, we sat down. We discussed the matter at hand, the arrest in Bayonne, and he stated, "This is the first legitimate arrest the F.B.I. ever had me for." We continued a discussion and he stated, "That is one thing you guys have that I don't have, stool pigeons."
>
> He was asked what he was doing in the garage and at first he stated, "What garage?" and then later he stated he was trying to "help a guy out."

In permitting the evidence to be introduced, the trial court ruled (R. 79b–80b):

> As I stated before, I find from the testimony I have heard that the statements made by the defendant Harold Konigsberg when he was in custody were not involuntary statements but on the contrary that they were made voluntarily by him and he had been advised of his rights to counsel and of the fact that anything he might state could be used against him. He was, as I find from the testimony, warned before he made any statements that he was not required to make statements, that any statements he did make could be used against him.
>
> He was likewise advised of his right to counsel.
>
> There is no evidence of any intimidation, no evidence, circumstantial or otherwise, that he was under duress or that any hope of reward or

promise of leniency were held out to him to induce statements.

He might well have chosen to refuse to say anything. He chose to make comments, and the text of them would indicate the voluntary nature.[2]

ARGUMENT

1. This case was tried, and the interview with petitioner conducted, prior to the decision of this Court in *Escobedo* v. *Illinois,* 378 U.S. 478. In view of the circumstances under which the incriminating statements made by petitioner were obtained, we believe that the court below was correct in its conclusion that the *Escobedo* decision did not require the reversal of petitioner's conviction, which was amply supported by other evidence.

Escobedo is distinguishable from the instant case in several important aspects. Escobedo was a 22-year-

[2] Subsequently, when he took the stand on his own behalf, petitioner testified that as soon as he was arrested, he requested permission to call his attorney, and repeated this request many times after he had been driven to Newark (R. 208a–209a). He stated that the F.B.I. agents did not tell him that he had a right to a lawyer before saying anything (R. 209a). He denied telephoning his attorney at about 1:20 a.m. on January 12 from the F.B.I. office. He testified that it was not until 3:00 or 4:00 a.m. at Newark Police Headquarters that he was allowed to make such a call (R. 210a–211a). When asked if he had told the agents that this was the "first legitimate arrest the F.B.I. ever had", he answered, "The only thing I ever know is this is the first time I have ever been arrested by the F.B.I. for anything, and if there was any conversation about it that is my only knowledge" (R. 211a). Petitioner admitted that he had been convicted of robbery in 1949 (R. 225a). He had also been arrested on other numerous occasions (see R. 22b–23b).

old youth of Mexican extraction with no previous police record; petitioner, 35 years of age (R. 214a), had been convicted of robbery in 1949 (R. 225a) and had been arrested on numerous occasions (R. 22b-23b). Escobedo was not advised of his constitutional right to remain silent. Petitioner, before making his voluntary admissions, was advised of his right to counsel and that any statement he made would be used against him in court (R. 76b). It is evident from the record that he was well aware of his rights. Whereas Escobedo was confronted with false accusations by a co-defendant that he had fired the fatal bullets, petitioner was merely given an opportunity to explain his presence at the place where he knew the stolen goods were found. Escobedo, handcuffed and in a standing position, was subjected to a gruelling, accusatory interrogation focused upon him alone and designed to extract a confession; petitioner was questioned by the agents in a general inquiry as to the facts regarding illegal possession of stolen goods in the garage, in a relatively casual conversation incidental to administrative tasks of fingerprinting, taking photographs, and counting petitioner's money. Unlike Escobedo, who executed a signed confession, petitioner made only potentially incriminatory admissions falling far short of a confession.

2. The issues as to the validity of petitioner's arrest and seizure of the stolen goods (see Pet. 23–26, 29–31) and the propriety of the court's charge are answered in the government's brief in opposition in *Celso* v. *United States*, No. 492, this Term, pp. 6–7, 9–10.

CONCLUSION

For reasons stated it is respectfully submitted that the petition for a writ of certiorari should be denied.

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